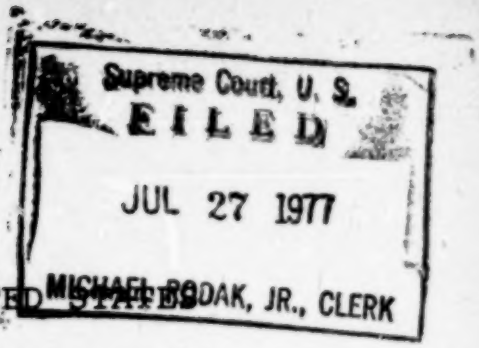


IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977.

No. 77-145

EDGAR T. CRISMON and MAXINE CRISMON, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

BURNS, FERRIN & EHRENREICH
1301 United Bank Building
3550 North Central Avenue
Phoenix, Arizona 85012

By: Arthur D. Ehrenreich
ATTORNEYS FOR APPELLANTS

July, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977.

No.

EDGAR T. CRISMON and MAXINE CRISMON, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals

for the Ninth Circuit, entered March 29, 1977; rehearing denied May 3, 1977; and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 550 F.2d 1205 (1977). The Order of the Court denying Appellants' Motion For Rehearing is not reported. The judgment of the United States District Court for the District of Arizona is not yet reported. Copies of the opinions and orders are attached as Appendix A.

JURISDICTION OF THIS COURT

Appellants brought suit in the United States District Court under 26 U.S.C. § 7422 seeking the vacation of a final, administrative decision of the Internal Revenue Service denying Appellants' claim for a refund of income taxes paid for the calendar year 1966 based on a net operating loss carryback accruing to Appellants for calendar year 1969. The District Court granted Appellee's Motion to Dismiss and entered judgment on September 29, 1975. Pursuant to 28 U.S.C. § 1291, Appellants appealed the District Court judgment in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the District Court and entered judgment March 29, 1977; rehearing denied May 3, 1977. The jurisdiction of the Supreme Court to review the decisions

below by direct appeal is conferred by 28 U.S.C. § 2101(c).

QUESTION PRESENTED

Can a piece of paper bearing a designation as a "Form 1045", filed <u>after</u> the permissible time for filing a valid "Application for Tentative Refund from Carryback of Net Operating Loss or Unused Investment Credit", under 26 U.S.C.A. § 6411 nevertheless serve as an <u>informal notice</u> to the Commissioner of Internal Revenue of a refund owed to the filing taxpayer if the "piece of paper" is filed within the forty-month limit for filing net operating loss carryback claims due as provided in 26 U.S.C.A. § 6511(d)(2)(A)?

STATUTES INVOLVED

26 U.S.C. §§ 6402, 6411, 6511(d)(2)(A), 7422; 28 U.S.C. § 1346(a)(1).

STATEMENT OF THE CASE

Prior to April 15, 1967, Appellant, EDGAR T. CRISMON (sometimes referred to as CRISMON and/or TAXPAYER) and his then wife, CHARLOTTE, now deceased, timely filed a joint Federal income tax return for the calendar year 1966 which reflected a total tax liability of $11,867.00. TAXPAYER timely paid their tax liability.

For the calendar year ending December 31, 1969, Appellant, EDGAR T. CRISMON, and his then and present wife, Appellant MAXINE CRISMON, sustained a net operating loss of $19,186.00. Thereafter, CRISMON's accountants filed a piece of paper (Form 1045), which was received by the Internal

Revenue Service (hereinafter, IRS), on March 6, 1973. The piece of paper gave IRS actual and constructive notice that CRISMON had an income tax refund due of $6,858.00 for calendar year 1966. By letter dated April 12, 1973, IRS rejected the piece of paper as a claim for refund. Enclosed with the IRS letter of rejection were Forms 843; the IRS letter invited the filing of the Form 843.

On or about September 17, 1973, CRISMON filed a Form 843 but was informed by letter from IRS dated October 26, 1973, that the claim for refund was untimely filed since the applicable statute of limitations had expired. CRISMON again presented their claim for refund on a Form 843 which was received by IRS on March 11, 1973 and, again, IRS rejected the claim by letter dated April 18, 1974.

CRISMON timely brought suit under 26 U.S.C. § 7422 in the U. S. District Court for the District of Arizona on May 23, 1975. IRS countered with a Motion to Dismiss on July 29, 1975 to which CRISMON responded and IRS replied. The District Court entered judgment on September 29, 1975, dismissing CRISMON's Complaint. CRISMON appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court of Appeals affirmed the District Court's action by judgment entered March 29, 1977 and denied rehearing on May 3, 1977.
In affirming the District Court's judgment, the Court of Appeals held that the piece of paper, "Form 1045" which CRISMON originally filed within the time allowed for filing a claim for refund could not serve as an informal notice of the claim.

THE QUESTION IS SUBSTANTIAL

Pursuant to U.S.C.A. § 6411, CRISMON would have had to file a "Form 1045" by December 31, 1970. The "piece of paper" filed by CRISMON was filed well beyond that date which the IRS could determine at a glance by comparison of the receipt date of the "piece of paper" (March 6, 1973) with the date of the "taxable year ended" (1969) noted thereon. By any interpretation of the applicable IRS regulations and the Tax Code, Title 26, U.S.C.A., CRISMON's "piece of paper" could not possibly serve as a "Form 1045"; consequently, regardless of the appearance of the numerical designation on the paper, no "Form 1045" was ever filed by CRISMON. Rather, CRISMON's "piece of paper" was an INFORMAL claim for refund timely filed under 26 U.S.C.A. § 6402 and § 6511(d)(2)(A).

Although the form preferred by IRS for filing a claim for refund bears the designation, "Form 843", the "piece of paper" filed by CRISMON was far more informative with respect to the computation of the dollar refund due than CRISMON's subsequently filed Form 843, (Appendix, p. A-12 to A-14).

In essence, CRISMON agrees with IRS that a valid Form 1045 cannot serve as an informal claim under § 6411, but when the "Form 1045" is filed late (i.e., more than twelve months beyond the close of TAXPAYER's fiscal year within which the loss occurred), it becomes a legal nullity as a "Form 1045", but that "piece of paper" should certainly be able to serve as a valid, INFORMAL claim for refund; particularly as (1) the form presents more detailed information on the calculation

of the refund due than any IRS form including the preferred Form 843 and (2) the invalidity of a Form 1045 is determinable at a glance, the expenditure of which is made mandatory upon the IRS pursuant to the terms of 26 U.S.C.A. § 6411.

In the Courts below, IRS' position when distilled, calls for an inflexible "designation of numbers game". As case law authority, IRS and apparently the Ninth Circuit Court of Appeals relied heavily on the decision of Rock v. U.S., 279 F.Supp. 96 (S.D.N.Y. 1968) wherein the Court rejected the notion that a late-filed "Form 1045" could serve as an informal claim. The decision in Rock is premised on the purported misleading of IRS due to the alleged lack of communication by the taxpayer of his intent

to have his Form 1045 treated as a claim for refund or that the IRS understood it to be such (Rock, supra, p. 99). The Court in Rock additionally argued that the IRS would have to search the "four corners" of the form to determine whether the form is an informal refund claim (p. 100).

As noted above and demonstrated in the Appendix (p. A-12 to A-14), the IRS is required under 26 U.S.C.A. § 6411, to expend at least a mere glance at the piece of paper coming before it. Furthermore, the IRS glance does not require an investigation of the intensity forecasted by the U. S. District Court in the Rock decision, p. 100, or this Court's decision in Angelus Milling Co. v. Commissioner, 325 U.S. 293, 65 S. Ct. 1162, 89 L. Ed. 1619 (1945), i.e., the

Commissioner rummaging through its various offices, file cabinets, statutes and the Internal Revenue Code.

It is inconceivable that the Commissioner of Internal Revenue and every one of the employees working therein can be misled by the information set forth on the delinquently filed Form 1045, i.e., the unique content of the information disclosed on the invalid Form 1045 (whose invalidity is so easily determined at a glance) cannot be interpreted for anything else but a piece of paper "claiming credit for an income tax refund". What more can a taxpayer do in giving informal notice to the IRS that the taxpayer is seeking a claim for refund. Additionally, the IRS after rejecting TAXPAYER's informal claim for refund (because it was supposedly

"misled"), by letter invited the TAXPAYER to file Form 843, which form this Court clearly knows discloses less information than that voluntarily supplied by the TAXPAYER on the invalid Form 1045.

In fact, IRS' letter of April 12, 1973 rejecting CRISMON's claim on their "piece of paper" and inviting the use of "Form 843" conclusively establishes that IRS knew that CRISMON sought a tax refund.

This Court declared in United States v. Kales, 314 U.S. 186, 194, 62 S. Ct. 214, 86 L. Ed. 132 (1941), that:

> "This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too

general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period."

CRISMON comes fully within the compass of this Court's test. While CRISMON's "piece of paper" admittedly "does not comply with the formal requirements of the statute and regulations," it suffers no infirmity as being "too general" since, as noted above, it provides far more information than the formal "Form 843", nor can it be denied that it furnishes "...notice fairly

advising (IRS) of the nature of (CRISMON's) claim...". Therefore, CRISMON's "piece of paper" must be treated "...as a claim...", particularly as the facts herein show that the "formal defects and lack of specificity (were) remedied by amendment (CRISMON's subsequently filed Form 843)... after the lapse of the statutory period."

In Kales the informal notice was a letter. Since that time other variants on informal notice have met with judicial approval. In Cumberland Portland Cement Co. v. U.S., 104 F.Supp. 1010, 1013 (Ct. Cl. 1952), the Court stressed substance over form and accepted a letter accompanying a rejected Waiver Form as adequate, informal notice. See also, Watson v. U.S., 246 F.Supp. 755, 757 (E.D. Tenn. 1965). The taxpayer's own typewritten imitations of IRS' Waiver Form were accorded informal

notice status in Stuart v. U.S., 130 F.Supp. 386, 388, 389 (Ct. Cl. 1955). "A notation on the back of a check paying the taxes" sufficed as an informal claim in Night Hawk Leasing Co. v. U.S., 18 F.Supp. 938, 941 (Ct. Cl. 1937). In American Radiator Standard Sanitary Corp. v. U.S., 381 F.2d 915 (Ct. Cl. 1963) Taxpayer's erroneous attempted deductions appearing on an income tax form were recognized as an informal claim; and in Helis v. Usry, 496 F.2d 1319, 1321 (5 Cir. 1974), deductions on partnership tax returns were adjudged sufficient as informal refund claims since the deductions were adequate "...to advise the Commissioner of Internal Revenue as to the items to which taxpayer claims error and the grounds upon which the taxpayer makes the claim...".

Had the Form 870 contained the detailed computation of the refund claim that an invalid Form 1045 does, it would clearly have passed muster in Barenfeld v. U.S., 442 F.2d 371, 374 (Ct. Cl. 1971), where the Court, in line with the spirit of Kales, supra, said:

> "It is not necessary that a claim for refund or credit be submitted to the Internal Revenue Service in any particular form. If a taxpayer submits to the Internal Revenue Service some sort of written instrument which informs the administrative agency that the taxpayer believes that he has been subjected to an erroneous or illegal tax exaction, and that he desires a refund or credit because of

such action, this is sufficient...".

When so many makeshift methods can serve as acceptable informal notices, it defies elementary reason to bar CRISMON's "piece of paper", which IRS could, and, in fact, was required to classify as invalid as a "Form 1045" at a glance, supra, as a valid informal notice. Especially is logic disturbed when one considers that the "piece of paper" filed by CRISMON carried all the accounting information necessary to put IRS on notice that both a claim for refund was requested and the manner by which the refund was precisely computed, as admitted by IRS, ("Brief of the Appellee" in the Court of Appeals, p. 19, line 22 to p. 20, line 1); and, further, when the "piece of paper" actually bears more

computations on the refund than the preferred "Form 843" (Compare Appendix p. A-12 to A-14).

The view of Rock might have sound application to Forms 1045 which are initially valid with respect to filing time under § 6411 but, on subsequent analysis, prove defective and are rejected. In such case, the taxpayer would still have a minimum of two years to file a Form 843 pursuant to § 6402 and § 6511 (d)(2)(A). Under the facts of this case, the purported Form 1045 was void ab initio as a § 6411 filing and, therefore, it could only serve as an informal notice of a claim under § 6511(d)(2)(A), Kales. Allowing CRISMON's "piece of paper" to serve as such cannot possibly destroy the "...value and effectiveness of the uniquely rapid remedy fashioned by Congress

in 26 U.S.C.A. § 6411...", Rock, p. 100, since there is no nexus between the two procedures.

As recognized by the basic concept of Kales, it could hardly be congressional intent to deprive non-corporate taxpayers of monetary refunds due, as in CRISMON's case, because the taxpayer has used a "piece of paper" with one number on it rather than another.

CONCLUSION

The cleavage in this case is clear. IRS is promoting an inflexible standard calling for strict adherence to formal forms in reliance on the District Courts' decision in Rock; whereas CRISMON is advocating the flexible standard of this Court in Kales and its progeny. Precedence, authority, fairness and

reasonableness lie with Kales.

However, the actions of the lower Courts in this case have upheld the IRS position. Therefore, a substantial judicial question is raised whose importance is heightened by the consideration of the conflict herein between the protection of the sources of treasury funds as against the refund rights of non-corporate taxpayers.

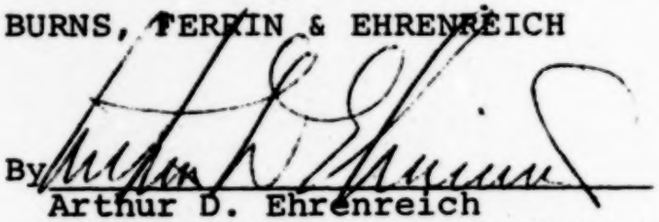
Beyond question, CRISMON has fully satisfied the tests of the applicable law from Kales to the present; therefore, their "piece of paper" was a valid, informal and completely informative claim for refund subsequently formalized by CRISMON's filing of a Form 843. In consequence, jurisdiction rested in the District Court.

WHEREFORE, CRISMON respectfully

urges that this Court reverse the decision of the Court of Appeals and order remand of this cause to the District Court for trial.

Respectfully submitted,

BURNS, TERRIN & EHRENREICH

By 
Arthur D. Ehrenreich
ATTORNEYS FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR T. CRISMON and MAXINE CRISMON, his wife,	)	
Plaintiffs-Appellants,	)	No. 75-3381
v.	)	O R D E R
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Before: HUFSTEDLER, GOODWIN and

ANDERSON, Circuit Judges

The petition for rehearing is

DENIED.

DATED: April 29, 1977.

FILED

May 3 1977

Emil E. Melfi, Jr. Clerk

U. S. Court of Appeals

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

Civil Action File
No. 75-336 PHX WEC

EDGAR T. CRISMON, et ux., Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	JUDGMENT

The action came on for hearing before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff take nothing and that the action be dismissed.

Dated at Phoenix, Arizona, this 29th

day of September, 1975.

W. J. FURESTENAU, Clerk

By: Phyllis L. Martin
Deputy Clerk of Court

FILED

Sep 29 1975

W. J. Furstenau, Clerk

United States District Court

For the District of Arizona

By.....
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR T. CRISMON and MAXINE CRISMON, his wife,	)	
Plaintiffs-Appellants,	)	No. 75-3381
v.	)	O P I N I O N
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the District of Arizona

Before: HUFSTEDLER, GOODWIN and ANDERSON, Circuit Judges

PER CURIAM:

Taxpayers Edgar T. Crismon and his wife, Maxine (The Crismons), brought suit in the district court below, seeking a tax refund. They claimed a refund of federal taxes paid in the 1966 tax year. The basis was a net operating loss in the tax year 1969 which they proposed to carry back to the year 1966. The district court

dismissed the suit for lack of jurisdiction because the Crismons had not filed a proper claim for a refund within the statutory time period. We affirm.

Under 26 U.S.C. 6511 (d)(2)(A) the Crismons had until the 15th day of the 40th month after the end of the taxable year 1969 to file a claim for a refund. This made the last day to file April 15, 1973. They did not file the proper claim for a refund (Form 843) until September 24, 1973, outside the statutory time limit. The Crismons argue that a Form 1045 (Application for Tentative Refund from Carryback of Net Operating Loss) which was filed on March 6, 1973, was a timely informal claim for a refund. We disagree. The Internal Revenue Code (26 U.S.C. 6411 (a), the Treasury Regulations (§ 1.6411-1(b)(2), and Form 1045

itself all state specifically that Form 1045, Application for Tentative Carry-back Adjustment, is not a claim for a credit or refund. See Rock v. United States, 279 F. Supp. 96 (S.D. N.Y. 1968). We therefore find that filing of the 1045 Form was not a proper claim for a refund, and that the proper form filed by the Crismons was untimely.

Under 26 U.S.C. 7422(a), the Crismons are prevented from maintaining a suit in any court for a tax refund until a claim for a refund has been "duly filed." An untimely refund claim is not "duly filed." Therefore, the district court properly dismissed the suit for lack of jurisdiction.

The Crismons' contention that the IRS has waived the statute of limitations or is estopped to assert that defense is

without merit.

AFFIRMED.

FILED

Mar 29 1977

Emil E. Melfi, Jr.

Clerk, U. S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENTERED JUL 13 1977

EDGAR T. CRISMON and MAXINE CRISMON, his wife,	)	
Plaintiffs/Appellants,	)	No. 75-3381
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant/Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that EDGAR T. CRISMON and MAXINE CRISMON, his wife, Plaintiffs/Appellants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered March 29, 1977; rehearing denied by this Court on May 3, 1977.

This appeal is taken pursuant to 28 U.S.C. § 2101(c).

DATED this 7th day of July, 1977.

Respectfully submitted,

BURNS, FERRIN & EHRENREICH

By s/ Arthur D. Ehrenreich
Arthur D. Ehrenreich
ATTORNEYS FOR PLAINTIFFS/
APPELLANTS
1301 United Bank Building
3550 North Central Avenue
Phoenix, Arizona 85012

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Notice of Appeal have been served upon the persons named herein in a sealed envelope in the United States mail, postage prepaid, certified mail, return receipt requested, and properly addressed as follows:

Clerk, United States District
Court for the District of Arizona
Federal Building
230 North First Avenue

Phoenix, Arizona 85025

The Solicitor General
United States Department of Justice
10th Street and Constitution Avenue,
N. W.
Washington, D. C. 20530

Scott P. Crampton, Esq.
Assistant United States Attorney
Appellate Section, Tax Division
Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D. C. 20530

Meade Whitaker, Esq.
Chief Counsel
Internal Revenue Service
Washington, D. C. 20224
COUNSEL FOR APPELLEE
All parties required to be served.

Said copies were served by mail this

7th day of July, 1977 at Phoenix, Arizona.

BURNS, FERRIN & EHRENREICH

By s/ Arthur D. Ehrenreich
Arthur D. Ehrenreich
ATTORNEYS FOR PLAINTIFFS/
APPELLANTS
1301 United Bank Building
3550 North Central Avenue
Phoenix, Arizona 85012

Application for Tentative Refund From Carryback of Net Operating Loss or Unused Investment Credit

For use by taxpayers other than corporations—Under section 6411 of the Internal Revenue Code

File this application separately from your income tax return to insure prompt action

Please read all instructions carefully before completing this form.

E. T. and Maxine Crisman

Your social security number: 526-18-9618

Spouse's social security number: 495-14-3529

Number and street: P. O. Box 155

Employer identification no., if any:

1 Taxable year ended: 1969

City or town, state, and ZIP code: Roll, Arizona 85347

2 Net operating loss: $ 19,186

3 Unused investment credit: $

4 Date the return was filed for year of net operating loss and/or unused investment credit ▶ 19 . Office where filed ▶

5 Enter the taxable years prior to the taxable year shown on line 1 which are affected by the carryback of the net operating loss or unused investment credit.

Computation of decrease in tax for each year shown on Line 5	3d preceding year 19 66 See Schedule Attached (a) Liability as last determined	3d preceding year (b) Liability after carryback	2d preceding year 19 ..... (c) Liability as last determined	2d preceding year (d) Liability after carryback	1st preceding year 19 ..... (e) Liability as last determined	1st preceding year (f) Liability after carryback
6 Adjusted gross income before adjustment for carryback	43,621	21,811				
7 Net operating loss deduction resulting from carryback		19,186				
8 Line 6 less line 7	43,621	2,625				
NOTE: If you use the tax table, skip to line 13, enter the tax, if any, on line 9.		21,810				
9 Total of itemized deductions; or, the standard deduction		24,435				
10 Line 8 less line 9	1,858	1,858				
11 Exemptions	4,764	22,577				
12 Taxable income, line 10 less line 11	1,200	1,200				
13 Income tax. See instruction C	40,564	21,377				
14 Retirement income credit	4,679	4,821				
15 Income tax paid at source on tax free covenant bond interest						
16 All other tax credit						
17 Investment credit. See instruction E						
18 Total of credits on lines 14 through 17	218	218				
19 Line 13 less line 18	218	218				
20 Tax from recomputing prior year investment credit	4,461	4,603				
21 Minimum tax						
22 Social security tax. See instruction F						
23 Total tax liability (add lines 19, 20, 21, and 22)	406	406				
24 Credit for overpayment, if any, on line 23, columns (b), (d), and (f)	4,867	5,009				
25 Overpayment, line 23 less line 24	5,005					
26 Refund claimed, see page 2. *If spouse filed separate return, see instructions.	5,858					

*If standard deduction or tax table is used.

Under penalties of perjury, I declare that this application (including any accompanying schedules and statements) has been examined by me and is, to the best of my knowledge and belief, a true, correct, and complete application.

HENRY & HORNE
CERTIFIED PUBLIC ACCOUNTANTS
12 NORTH CENTER
MESA, ARIZONA 85201
86-0133881

(Applicant's signature and date)

(If applicant's name is not correct, please correct it)

(Spouse's signature and date)

*See Attachment

A-12

BEST COPY AVAILABLE

E. T. [illegible] Estate of [illegible]

Taxpayer's Name

Soc. Sec. or E. I. No. 226-18-7318

1969 N.O.L. [illegible]

Taxable Year Ended 12-31-67

Estate of [illegible] to 1245

			Joint Return	H - ½	W - ½
The [illegible] Estate's [illegible]	[illegible]		[illegible]	[illegible]	[illegible]
[illegible] return with [illegible]	[illegible]		[illegible]	17,2[illegible]	[illegible]
Losses as set forth below					
1969 Loss From:					
Estate of [illegible] Estate	(13,020)				
Farm Income - F	(7,067)				
Interest Income	[illegible]				
N O L	(17,939)		(17,939)	(8,970)	(8,969)
Non Business Deductions			(1,377)	(688)	(689)
Total Amount that H is entitled to carryback to 1966			19,186		
1966 Adjusted Gross Income			93,621	21,911	21,910
In accordance with Revenue Rulings 55-140, 1955-1 C.B. 139 and 67-321, 1967-2 C.B. 211 and 71-332, 1971-2 C.B. 182					
H was entitled to the loss in 1969 (see 1969 return) [illegible] A.G.I. (shown above 21,911). If the carryback loss is more than is added to the remaining balance applied.	Total amount shown on his applicable share of the joint carryback loss				
H's A.G.I. For 1966				21,911	
N.O.L. Carryback From 1969				19,186	
Balance				2,725	
Add: ½ N.O.L. of deceased spouse				19,186	
Total -- Applicable Joint Return				21,911	
See Form 1045 attached					

Form No. 3172-14

Page ____ of ____

Form 843
(Rev. July 1972)
Department of the Treasury
Internal Revenue Service

Claim

Director's Stamp
(If to be mailed)

Use this claim to request refund of taxes illegally, erroneously, or excessively collected, refund of amount paid for stamps unused, or used in error or excess, abatement of tax assessed (not applicable to income, estate or gift taxes), or credit of overpayment of tax.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Internal Revenue Service
Ogden, Utah

Please print or type

1a. Name of taxpayer or purchaser of stamps
E. T. & MAXINE CRISMON

Number and street
P.O. BOX 155

City or town, State, and ZIP code
ROLL, ARIZ 85341

Fill in applicable items—Use attachments if necessary

2a. Your social security number: 526 18 9618
Wife's number, if joint return: 195 14 3529
b. Employer identification number (if any)

c. Internal Revenue Service office where return (if any) was filed
OGDEN, UTAH

d. Name and address shown on return, if different from above
E.T. & CHARLOTTE CRISMON
P.O. BOX 155
ROLL, ARIZ 85341

Roy & MAXINE PADGETT
RT. 1, BOX 78
ROLL, ARIZ 85341

e. Period—if tax reported on annual basis, prepare separate form for each taxable year
From JAN. 1, 1966, to DEC. 31, 1966

f. Kind of tax
INCOME

3. Amount of assessment
$ 1196T

Dates of payment
APRIL 15, 196T

h. Date stamps were purchased from Government

i. Amount to be refunded (if income tax, complete computation below)
$

j. Amount to be abated (not applicable to income, estate, or gift taxes)
$

4. The claimant believes that this claim should be allowed for the following reasons:
TAXPAYER INCURRED A NET OPERATING LOSS IN 1969, WHICH IS BEING CARRIED BACK TO 1966.
ATTACHED IS FORM 1045 ALONG WITH A SUPPORTING SCHEDULE REGARDING THE COMPUTATION OF THE N.O.L. CARRYBACK

Computation of Income Tax Refund	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	1196T
4 Additional income tax paid	
5 Total tax paid (add lines 1–4)	1196T
6 Less: Your computation of correct tax	5229
7 Amount of overpayment	6850
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	6852

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed E. T. Crismon

Dated Sept 17, 1973 By Maxine Crismon

See instructions on reverse. Form 843 (Rev. 1-72)

A-14

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Supreme Court, U. S.
FILED
SEP 9 - 1977
MICHAEL RODAK, JR., CLERK

No. 77-145

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDGAR T. CRISMON, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-145

EDGAR T. CRISMON, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Appellant seeks review of the decision of the court of appeals dismissing his suit for refund of federal income taxes for 1966 for lack of jurisdiction, on the ground that he had not filed a proper claim for refund within the statutory period. Since this case does not meet the requirements of 28 U.S.C. 1254(2) or any other statute conferring appellate jurisdiction on this Court, the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied.

On March 6, 1973, appellants filed with the Internal Revenue Service a completed Treasury Form 1045 (Application for Tentative Refund from Carryback of Net Operating Loss or Unused Investment Credit), which claimed a $6,858 decrease in tax for 1966 resulting from a carryback to that year of a $19,186 net operating loss in

1969 (R. 2, 16-17, 41; J.S. A-12 to A-13).[1] By certified letter dated April 12, 1973, the Internal Revenue Service informed appellant that his application for a tentative carryback adjustment was denied because it had not been filed within 12 months after the end of the tax year (1969) in which the net operating loss occurred (R. 18).

About five months later taxpayer filed a claim for refund (Treasury Form 843) for $6,858, which the Internal Revenue Service received on September 24, 1973 (R. 19; J.S. A-14). By certified letter dated October 26, 1973, the Service notified appellant that his claim for refund was denied because the three-year statute of limitations for filing a claim based on a net operating loss for 1969 had expired on April 15, 1973 (R. 22).

Appellant thereafter instituted together with his wife this suit for refund in the United States District Court for the District of Arizona, claiming that their untimely application for a tentative carryback adjustment (Form 1045) should have been treated as an "informal" claim for refund sufficient to withstand the bar of the statute of limitations (R. 41-47). The district court dismissed the complaint, and the court of appeals affirmed. They held that an application for a tentative carryback adjustment is not a claim for refund because Section 6411(a) of the Internal Revenue Code, Treasury Regulations on Income Tax, Section 1.6411-1(b)(2), and the instructions accompanying Form 1045 all state that an application for a tentative carryback adjustment is not a claim for credit or refund (J.S. A-5 to A-6).[2]

The decision of the court of appeals is correct and is in accord with the other courts that have considered the issue. See *Rock* v. *United States*, 279 F. Supp. 96 (S.D. N.Y.);

[1]"R." refers to the duplicated record filed in the court of appeals.

Schrader v. *Internal Revenue Service*, 35 A.F.T.R. 2d 686 (W.D. Ky.), decided January 17, 1975. Section 6411(a) of the Code provides that "[a]n application * * * [for a tentative carryback adjustment] shall not constitute a claim for credit or refund." The reason that an application for a tentative carryback adjustment is not treated as a claim for refund is because they involve completely different procedures.

For example, the issues presented by an application for a tentative carryback adjustment are solely computational, *i.e.*, the taxpayer's reported net operating loss and the accuracy of his prior tax returns are, for purposes of the tentative adjustment, assumed to be correct. But the Internal Revenue Service does not make such assumptions in considering a claim for refund. Moreover, unlike disallowance of a claim for refund, the Service's disallowance of a tentative carryback adjustment (in whole or in part) is final and cannot be challenged in any proceeding. See Treasury Regulations, Section 1.6411-3(c).[3] Finally, a taxpayer can file a claim for refund (or credit) based upon a net operating loss carryback regardless of the Internal Revenue Service's treatment of his application for a tentative carryback adjustment.

In view of the statutory and regulatory differences between a tentative carryback adjustment and a claim for refund, the courts below correctly rejected appellant's contention that his application for a tentative carryback adjustment be treated as a claim for refund.

[2]See also H.R. Rep. No. 849, 79th Cong., 1st Sess. 23 (1945), which states that "[a]n application for a tentative carry-back adjustment is not to constitute a claim for credit or refund."

[3]As Form 1045 indicates, an allowance of a carryback adjustment is "tentative" only.

United States v. *Kales*, 314 U.S. 186, upon which appellant relies (J.S. 12-14), is not to the contrary. There, the Court held that a letter could constitute an informal claim for refund where (1) the Commissioner was fairly advised as to the nature of the taxpayer's claim and treated the letter as a claim for refund, and (2) the defects or irregularities were "formal" in nature (314 U.S. at 194). Here, however, the application for a tentative carryback adjustment did not advise the Commissioner of the substantive nature of appellant's claim. Indeed, in denying the application, the Commissioner advised appellants (R. 18) that the document was not a claim for refund and that their recourse was to file a proper claim for refund.

Furthermore, appellants do not meet the second requirement of *Kales*. As we have pointed out *supra*, p. 3, the differences between an application for a tentative carryback adjustment and a claim for refund are substantive and not merely formal in nature. See *Rock* v. *United States*, *supra*, 279 F. Supp. at 98-99.

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

DOJ-1977-09